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Supreme Court of the United States

October Term 1946

No. 609

CHARLES A. DANA, SIR JAMES DUNN, JOHN W. HUBBARD and NEWCOMBE C. BAKER, as a Common Stockholders Committee, Equitable Office Building Corporation,

Petitioners,

v.

J. DONALD DUNCAN, as Trustee, *et al.*,

Respondents.

No. 610

IN THE MATTER

of

EQUITABLE OFFICE BUILDING CORPORATION (name changed to "Equitable Office Building 1913 Co., Inc."),

Debtor,

EQUITABLE OFFICE BUILDING 1913 CO., INC.,

Petitioner,

J. DONALD DUNCAN, as Trustee, *et al.*,

Respondents.

No. 612

ADELAIDE H. KNIGHT and WILLIAM P. DOYLE, Common Stockholders of the Equitable Office Building Corporation, Debtor,

Petitioners,

v.

J. DONALD DUNCAN, as Trustee, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF OF DEBENTURE HOLDERS' PROTECTIVE COMMITTEE IN OPPOSITION

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November 9, 1946

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SUPPLEMENTAL BRIEF OF DEBENTURE HOLDERS' PROTECTIVE COMMITTEE IN OPPOSITION

Statement

There has been filed with this Court in opposition to the petitions for writs of certiorari a brief by all the debenture holders, including the undersigned, which contains a statement of all the pertinent factual data. We adopt the

complete factual statement and argument in said brief. This brief is limited to the sole proposition that the questions presented to this Court are purely hypothetical and that the petitions are utterly lacking in substance, in view of the absence of any underwriting commitment to support the proposed new plan.

ARGUMENT

Since there is now no semblance of a commitment to support the proposed new plan, the questions presented are hypothetical and the petitions are lacking in substance.

In essence, the petitions herein are based upon the refusal of the District Court to reopen the proceedings *de novo* and to consider a new plan, after the Trustee's Plan had been finally confirmed and was all but finally consummated and the time to appeal from such confirmation had expired.

The new plan offered by the petitioners in the District Court proposed to treat the security holders as follows: For each ten shares of old common stock there would be issued to the stockholders one new share. In order to raise funds to satisfy in full the claims of the debenture holders, it was proposed that (a) the stockholders be given the right for each share of existing stock to subscribe to one share of new stock at $6 per share (which would raise $5,172,488), and (b) the balance of about $770,000 required would be taken from the treasury. This offering of new stock to the stockholders at $6 per share would be underwritten by City Investing Company, which was to receive as a bonus 69,686 shares of new common stock.

This underwriting commitment, which was an integral and essential part of the petitioners' new plan, was subject to many conditions and was limited to a period of ninety days, which expired on October 15, 1946. The commitment

has not been extended, and at the present time there is not even a semblance of a commitment.

It would accordingly be academic to ask this Court to consider the petitions herein, which are based upon such expired commitment. Without the commitment, the petitioners have no new plan whatsoever to propose to the District Court. The questions on these petitions have accordingly become academic and hypothetical. The substance of the petitions and of the appeals has vanished.

In *U. S.* v. *Alaska Steamship Co.*, 253 U. S. 113 this Court stated (p. 116):

> "Where by an act of the parties, or a subsequent law, the existing controversy has come to an end, the case becomes moot, and should be treated accordingly. However convenient it might be to have decided the question of the power of the Commission to require the carriers to comply with an order prescribing bills of lading, this court 'is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard.' "

The authorities in this Court have uniformly recognized that an appeal should not be entertained where it presents no actual controversy involving real and substantial issues. Appellate courts should not be requested to render a declaratory judgment on purely hypothetical questions. This is especially true where the Court is being requested to render such a declaratory opinion in order to set aside a plan that has been confirmed and all but finally consummated. (See: *Mills* v. *Green*, 159 U. S. 651; *Security Life Ins. Co.* v. *Prewitt*, 200 U. S. 446; *Richardson* v. *McChesney*, 218 U. S. 487.)

CONCLUSION

The petitions for writs of certiorari should be denied and the stay vacated.

Respectfully submitted,

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Protective Committee.